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90-1015



NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

J. O. DAVIS,

Petitioner,

VS.

REGINALD JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

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## QUESTIONS PRESENTED

1. Do the requirements and guidelines of Swain v. Alabama, 380 U.S. 202 (1965), allow a habeas corpus petitioner to establish a prima facie violation of the guidelines of that case through the presentation of conclusory, anecdotal testimony that, in the opinion of the witnesses, the prosecution has in the past used its peremptory challenges in a racially discriminatory manner?

2. Does the opinion of the Fifth Circuit Court of Appeals in Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, 109 S.Ct. 1328 (1989), state the proper standard for evaluation of statistical evidence in a Swain case?

3. Does the law of the case doctrine apply when a fair reading of the original opinion does not support the

application given in a subsequent opinion and when the original opinion is ambiguous?

## PARTIES

The caption contains the names of all the parties below.

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## OPINIONS BELOW

1. The opinion of the Eleventh Circuit Court of Appeals, which remanded the case to the District Court for an evidentiary hearing, appears at Jones v. Davis, 835 F.2d 835 (11th Cir. 1988) and is reproduced as Appendix I, hereto (1a - 21a).

2. The unpublished Report and Recommendation of the magistrate, which recommended denial of Jones' Petition for a Writ of Habeas Corpus is reproduced as Appendix II, hereto (22a - 77a).

3. The unpublished order of the District Court, which adopted the Report and Recommendation of the magistrate as the opinion of the Court is reproduced as Appendix III, hereto (78a).

4. The opinion of the Eleventh Circuit Court of Appeals which reversed the District Court's denial of the writ

of habeas corpus appears at Jones v. Davis, 906 F.2d 552 (11th Cir. 1990) and is reproduced as Appendix IV, hereto (79a - 88a).

5. The unpublished order of the Eleventh Circuit Court of Appeals denying the Petitioner's Suggestion of Rehearing En Banc and Petition for Rehearing is reproduced as Appendix V, hereto (89a-90a).

6. The unpublished order of the Eleventh Circuit Court of Appeals granting the Petitioner's Motion for Stay of Mandate until November 15, 1990 is reproduced as Appendix VI, hereto (91a-94a).

## JURISDICTION

The order of the Eleventh Circuit Court of Appeals denying Petitioner's Suggestion of Rehearing En Banc and Petition for Rehearing is dated September 17, 1990. The jurisdiction of this Court is based upon 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment, which provides:

> "nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

2. Code of Alabama 1975 §12-16-100(a), which provides:

> "In every criminal case the jury shall be drawn, selected and empaneled as follows: ... the court shall require a strike list or lists to be compiled from the names appearing on the master strike list. ... A strike list shall be furnished for the trial of any case at hand and a copy thereof given to all parties. The jurors whose names appear thereon shall be brought into open court, the case shall be called and in the presence of the district attorney and the defendant and his attorney, the jurors shall be examined on voir dire for the trial of the case at hand. After the conclusion of the voir dire examination and the removal from the strike list

> of the names of those jurors who were challenged or excused for good reason, the district attorney shall be required first to strike from the strike list the name of one juror, and the defendant shall strike one, and they shall continue to strike off names alternately until only 12 jurors remain on the strike list and these 12 jurors thus selected shall be the jury charged with the trial of the case. ..."

## STATEMENT OF THE CASE

### The Procedural History

Respondent Jones was indicted for the offense of burglary in the third degree during the September 1983 session of the Mobile County, Alabama grand jury. Jones v. Davis, 835 F.2d 835, 836 (11th Cir. 1988) (hereinafter referred to as Jones I). Jones was convicted of that offense by a Mobile County petit jury and was ultimately sentenced to life imprisonment pursuant to Alabama's

Habitual Felony Offender Act. Id. During jury selection, Jones objected to the assistant district attorney's use of seven of his nine peremptory challenges to remove all seven blacks from the jury venire. Id. Jones' motion for a mistrial was denied, but the State trial court allowed Jones to present additional evidence on this issue at a subsequent hearing. Id.

During the hearing, which was pursuant to Jones' motion for a new trial, Jones presented the testimony of six local criminal defense attorneys who testified that it was their belief that "it was the practice of the district attorney's office to exclude blacks from the jury service."* Id. The assistant

*The opinion of the Eleventh Circuit incorrectly states that "seven local criminal defense attorneys testified". Jones I, 835 F.2d at 836. In fact six local defense attorneys testified. Jones I, 835 F.2d at 838-839.

district attorney who prosecuted the case also testified, denying the existence of any pattern or policy of exclusion of blacks from juries. Id. The trial court denied relief and Jones appealed, raising as one issue the peremptory challenge claim. Id. The Alabama Court of Criminal Appeals affirmed Jones' conviction without opinion and the Alabama Supreme Court denied his petition for a writ of certiorari. Id.

Jones then sought federal habeas corpus relief based, inter alia, upon the prosecutor's use of his peremptory challenges. Id. The District Court denied relief and Jones appealed that decision to the Eleventh Circuit Court of Appeals. Id. The Eleventh Circuit Court of Appeals remanded the "case to the district court for an evidentiary hearing to be conducted pursuant to the

guidelines established in Willis v. Zant, [720 F.2d 1212, 1220 (11th Cir. 1983)]." Id., at 840.

On March 13-15, 1989, an evidentiary hearing was conducted before Magistrate William Cassady during which both parties introduced extensive evidence concerning the use of peremptory challenges by the prosecution by both the Mobile County District Attorney's Office as a whole and the specific assistant district attorney who prosecuted Jones. Jones v. Davis, 906 F.2d 552, 554 (11th Cir. 1990) (hereinafter referred to as Jones II). Magistrate Cassady recommended that relief be denied based upon Jones' failure to prove a prima facie case of racially motivated peremptory striking by the prosecution as required by Swain v. Alabama, 380 U.S. 202 (1965) and Willis v. Zant, supra.

Jones II, 906 F.2d at 554. The District Court adopted the recommendation of the magistrate and denied relief. (22a - 77a; 78a) Jones again appealed and following oral argument, the Eleventh Circuit Court of Appeals reversed the decision of the District Court and remanded the case with instructions to grant the writ of habeas corpus. Jones II, at 555. The State's Suggestion of Rehearing En Banc and Petition for Rehearing was denied on September 17, 1990. (89a-90a) On October 16, 1990, the Petitioner's Motion for Stay of Mandate Pending Application for Certiorari was granted until November 15, 1990. (91a-94a)

## REASONS FOR GRANTING THE WRIT

In Swain v. Alabama, 380 U.S. 202, 223 (1965), this Court held that the Equal Protection Clause was violated "when the prosecutor in a county, in case

after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause with the result that no Negroes ever serve on petit juries...". The Eleventh Circuit Court of Appeals altered that standard in Willis v. Zant, 720 F.2d 1212 (11th Cir. 1984), when that appellate court held that a habeas petitioner was not required to prove that the prosecutor always struck every black venireman in order to establish a prima facie violation of Swain.[1] As the Eleventh Circuit Court

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[1] That portion of Swain v. Alabama which set out the habeas petitioner's burden of proof was overruled in Batson v. Kentucky, 476 U.S. 79 (1986). There is no contention that this case is controlled by Batson. (3a)

of Appeals stated in Willis, winning Swain claims are extremely rare, and this Court has never elaborated upon its original pronouncement. Willis v. Zant, 720 F.2d at 1220. Even though Swain has been overruled in pertinent part, the existence of this case and other recent cases presenting claims founded upon Swain are compelling evidence that such claims are still viable even in the Batson era. This is an important question of federal law which this Court should settle.

Moreover, the Eleventh Circuit Court of Appeals decided the issue in a way which conflicts with the opinion of this Court in Swain and with the opinion of the Fifth Circuit Court of Appeals in Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, 109 S.Ct. 1328 (1989). The clearly-developed facts of

this case illuminate the issues in a helpful way, and this Court may not soon have another opportunity to resolve the conflict between the Fifth and Eleventh Circuit Courts of Appeal in which the issue is as clearly presented.

## THE ISSUES ARE IMPORTANT IN TERMS OF BOTH THE INTERESTS AT STAKE AND THE FREQUENCY WITH WHICH THE ISSUES ARISE

While Swain is no longer controlling law, that fact does not diminish the importance of that decision. Every black defendant whose case became final prior to the announcement of the Batson decision potentially has a Swain claim. See, e.g., Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878 (1986). While some of those claims will no doubt be procedurally defaulted, an indeterminate number will not.

Further, there have been at least five reported Federal appellate decisions[2] and at least two reported State appellate decisions[3] which addressed a Swain issue since January 1, 1987. Those numbers do not include unpublished opinions, cases which were decided without a written opinion and cases pending before Federal[4] and State trial

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[2] See, e.g., Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), Willis v. Kemp, 838 F.2d 1510 (11th Cir. 1988), Roman v. Abrams, 822 F.2d 214 (2nd Cir. 1987), Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987), Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987). The two Jones opinions are not included.

[3] See, e.g., Wright-Bey v. State, 444 N.W.2d 772 (Iowa Ct. App. 1989); Fant v. State, 756 S.W.2d 653 (Mo. Ct. App. 1988).

[4] At least 2 Swain cases have been the subject of published opinions by Federal District Courts. See, e.g., Smith v. Thigpen, 689 F. Supp. 644 (S.D. Miss. 1988); Hill v. Thigpen, 667 F. Supp. 314 (N.D. Miss. 1987). One case is pending before the District Court for the Northern District of Alabama, Jackson v. Thigpen, No. CV-87-C-2046-W, and another such case is being briefed in the Eleventh Circuit at this time, Horton v. Zant, No. 90-8522.

courts. Clearly, Swain remains an important decision on an issue which is still being heavily litigated. This Court should grant the writ so that the contours of Swain and the elements of a prima facie violation may be established.

As the Eleventh Circuit Court of Appeals noted in Willis, there have been very few successful Swain claims. Willis v. Zant, 720 F.2d at 1220.[5] This Court has not elaborated on Swain in the 25 years since the release of that opinion. Id. However, the number of recent appellate decisions addressing Swain indicates that the issue is still very much alive. Because Swain has not been definitively addressed by this Court, uncertainty as to the proper disposition of a major issue exists. This issue needs to be resolved by this Court.

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[5] Willis himself was unsuccessful with his Swain claim. See, Willis v. Kemp, 838 F.2d 1510 (11th Cir. 1988).

## THE ISSUE IS IMPORTANT IN TERMS OF THE INTERESTS AT STAKE

In its opinion reversing the District Court, the Eleventh Circuit Court of Appeals found that the conclusory evidence of the use of peremptory strikes by members of the Mobile County District Attorney's Office presented at Jones' hearing on his new trial motion was sufficient to establish the existence of a prima facie Swain violation in Jones' trial. See, Jones II, 906 F.2d at 554-555. The Court of Appeals reached this conclusion even though the evidence originally presented dealt specifically with only two cases tried by the prosecutor in Jones' trial after the Court of Appeals had specifically noted that to prevail the "petitioner must prove on specific facts [footnote omitted] that [the prosecutor]

had a systemic and intentional practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated in petitioner's trial." Jones I, 835 F.2d at 838. In the omitted footnote, the Court noted that allegations of discrimination are insufficient. Id. However, in Jones II, that panel of the Court of Appeals found that the Jones I Court had found a prima facie Swain violation based solely upon the very sort of conclusory allegations the Jones I Court warned against. see, Jones II, 906 F.2d at 555. In so doing, the Eleventh Circuit Court of Appeals has further confused the definition of a prima facie Swain case and has invited the argument that the opinion of that Court is a judicial pronouncement that a prima facie

Swain violation has been found to exist with regard to the Mobile County District Attorney's Office as a whole. The impact of this decision, and the litigation which it invites, will affect a large number of criminal convictions. This issue needs to be resolved by the Court.

### The Decision of the Eleventh Circuit Court of Appeals Directly Conflicts with the Opinion of the Fifth Circuit Court of Appeals in Edwards v. Scroggy.

In Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, 109 S.Ct. 1328 (1989), the Fifth Circuit Court of Appeals found that the death-row petitioner did not establish a prima facie Swain violation. The statistical evidence concerning the State's use of its peremptory strikes which was presented in Edwards was virtually identical to the statistical evidence

presented in Jones. However, the Eleventh Circuit Court of Appeals found a prima facie violation of Swain. This inter-Circuit conflict should be resolved by this Court.

In Edwards, the Fifth Circuit Court of Appeals found that no prima facie Swain violation was present when the statistical evidence established a 9 percent reduction from the number of blacks on the venire after challenges for cause (e.g., "reduced venire pool") to the number of blacks actually serving on juries. Edwards v. Scroggy, 849 F.2d at 205.[6] The evidence presented at the evidentiary hearing after the remand of this case established that the peremptory

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[6] In fact, the Fifth Circuit Court of Appeals reversed the finding of the District Court to the extent that that Court had held that a prima facie case had been proven but had been rebutted by the State. Edwards v. Scroggy, 849 F.2d at 208.

strike history of the prosecutor who tried Jones demonstrated a 10 percent reduction of the number of blacks on the reduced venire pool to the number of blacks actually serving on juries selected by that prosecutor. The statistical evidence presented in these cases is virtually identical, but the results are diametrically opposed. This conflict between the Fifth and Eleventh Circuit Courts of Appeal should be resolved by this Court.

### The Finding By The Eleventh Circuit Court Of Appeals That The Original Opinion Is The Law Of The Case Is Not Supported By a Fair Reading Of The Original Opinion.

In an ambiguous opinion, the Eleventh Circuit Court of Appeals remanded this case "for an evidentiary hearing to be conducted pursuant to the guidelines established in Willis v. Zant, supra." Jones I, 835 F.2d at 840. In

Jones II, that panel of the Eleventh Circuit Court of Appeals found that the original opinion had found a prima facie Swain violation and that the case had not been remanded "for a full Willis v. Zant hearing." Jones II, 906 F.2d at 554-555. The Court reached that opinion even though it acknowledged at oral argument, to the agreement of all parties, that the original opinion was ambiguous. Because the Jones I opinion is unclear in its holding, it is unfair to hold that the opinion is the law of the case, especially when the ambiguity of the opinion was apparent to everyone involved in this litigation and there was no serious objection interposed to a full Willis v. Zant hearing.

It is axiomatic that if an opinion is to be the law of the case, that opinion must not leave uncertainty as to what the law of the case is. See, e.g.,

Westbrook v. Zant, 743 F.2d 764 (11th Cir. 1984); Appleton Elec. Co. v. Graves Truck Line, Inc., 635 F.2d 603 (7th Cir. 1980). The Jones I opinion does not meet that criteria, but rather is internally inconsistent when interpreted as it has been by the Eleventh Circuit Court of Appeals. That inconsistency can only be resolved when the Jones I opinion is interpreted to require a full Willis v. Zant hearing. If the Jones I panel had found a prima facie Swain violation, it would have so stated and would further have stated that the District Court was only to decide whether that prima facie showing could be rebutted by the State. Moreover, it is inconsistent to hold, as the Jones II panel did, that the evidentiary hearing was to allow Jones to introduce additional evidence beyond that which, as found by the Jones II panel,

had already proven a prima facie case. That interpretation does not make sense because, if Jones had proven a prima facie case, there would be no reason for him to introduce additional evidence and the Jones I panel would have directed that the case proceed with the presentation of the State's rebuttal evidence.

The Jones II panel further compounded the ambiguity of the original opinion by holding that the magistrate had only the authority to evaluate the State's rebuttal evidence even though the original opinion had remanded the case for a Willis v. Zant hearing. Jones II, 906 F.2d at 555. Moreover, the Jones II panel relied upon dictum in a footnote in the Recommendation of the Magistrate to support its opinion that the State produced no rebuttal evidence. (18a-19a) That erroneous observation by the Magistrate, which cannot be reconciled with the facts recited in the Magistrate's own Recommendation, has served as the basis for the reversal of a

presumptively valid State conviction even though the evidence in this case establishes clearly that no Constitutional violation occurred.

The end result of the Jones II opinion is the transformation of a case which is controlled by Swain into a case which stands for the proposition that a habeas petitioner can prove a prima facie violation of Swain through conclusory and non-specific anecdotal testimony while the State is required to rebut that showing through evidence which would pass muster under Batson v. Kentucky. That result is not supported by any precedent, and is in direct conflict with Swain, Edwards, supra, and Willis, supra. This Court should grant the writ of certiorari and resolve that conflict.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 1990, I served a copy of the foregoing on the attorney for the Respondent, by placing said copy in the United States Mail, first class, postage prepaid and addressed as follows:

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third degree. During the selection of a jury for the trial of the case, the Assistant District Attorney of Mobile County, Alabama used seven of his nine peremptory strikes to excuse all blacks from the jury venire. Objecting to this tactic, Jones moved for a mistrial. The motion was denied, but the trial court granted Jones leave to proceed, at a subsequent evidentiary hearing, on this point. Jones was tried and convicted by an all-white jury. He was sentenced to life imprisonment in accordance with Alabama's habitual offender statute.[1]

Following the imposition of sentence, Jones filed a motion for a new trial alleging in part that the state's purposeful, deliberate and systematic use of its peremptory challenges to strike all blacks from his venire violated his

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[1] Ala. Code §13A-5-9 (1982).

constitutional rights. An evidentiary hearing was held during which seven local criminal defense attorneys testified in support of the motion. Each expressed a belief that it was the practice of the district attorney's office to exclude blacks from the jury service. The Assistant District Attorney who prosecuted the case also testified, denying the existence of any such pattern or policy of exclusion and justifying the use of his peremptory strikes in Jones' case by stating that "I didn't like the looks of those seven people and that's why I struck them." The trial court denied the motion for a new trial.

Jones appealed his conviction to the Alabama Court of Criminal Appeals, alleging as one ground for reversal that the trial court erred in denying the motion for a new trial based on the state's use of its peremptory challenges. The conviction was affirmed without opinion, rehearing was

denied and on October 19, 1984, the Supreme Court of Alabama denied Jones' petition for a writ of certiorari.

Having exhausted his state remedies, Jones then filed the present petition for habeas corpus in the United States District Court for the Southern District of Alabama, pursuant to 28 U.S.C. §2254 (1976), alleging that his "conviction violates the constitution or laws of the United States ... [because] [m]embers of the black minority were excluded by means of the prosecuting attorney using seven of his nine strikes to excuse all seven of the prospective black jurors." (Habeas Corpus Complaint, filed June 21, 1985, 10(a)(1)). Adopting the recommendation of the magistrate, the district court denied Jones' petition. This appeal followed.[2]

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[2] In his habeas complaint Jones also attacked the sufficiency of the evidence. The district court also rejected this ground for relief. This issue is not before us on appeal.

In denying Jones' petition for habeas corpus relief, the district court relied exclusively on the Supreme Court's opinion in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Swain was a black defendant convicted by an all-white jury of the rape of a white female. Relying on the Fourteenth Amendment's Equal Protection Clause, Swain challenged the prosecutor's use of peremptory strikes to excluse all black people from the petit jury. The Supreme Court refused to allow a challenge to the exclusion of blacks from a jury in any particular case, and stated that equal protection concerns would only be implicated if a pattern of systematic exclusion could be established.

Although widely criticized,[3] Swain remained the final word on peremptory challenges until the Supreme Court's recent

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[3] See e.g., Ashby, Juror Selection and the Sixth Amendment Right to an Impartial Jury, 11 Creighton L.Rev. 1137, 1161 (1978); Brown, McGuire & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New Eng.L.Rev. 192 (1978) (advocating abolition of peremptories for prosecution absent other steps to prevent abusive exclusion of minorities from juries); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235, 289 (1968); Massaro, Peremptories or Peers:-Rethinking Sixth Amendment Doctrines, Images and Procedures, 64 N.C.L.Rev. 501 (1986) (rejecting equal protection analysis and advocating use of Sixth Amendment); Note, The Jury: A Reflection of the Prejudices of the Community, 20 Hastings L.J. 1417 (1969); Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va.L.Rev. 1157 (1966); Note, Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss.L.J. 157, 159-60 (1967); Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale L.J. 1715 (1977); Note, Fair Jury Selection Procedures, 75 Yale L.J. 322 (1965); Recent Development, Racial Discrimination in Jury Selection-Limiting the Prosecutor's (cont. on next page)

decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In Batson, the Supreme Court held that a defendant could establish a prima facie case of an equal protection violation solely on the basis of proof regarding the prosecutor's action in his/her trial. According to the Court, a prima facie case is established if the defendant proves (1) that she/he is a member of a cognizable racial group; (2) that the prosecutor used peremptory strikes to remove members of the defendant's race from the venire; and (3) that an inference may be found that the venirepersons were removed because of race.

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[3](cont. from previous page)Right of Peremptory Challenge to Prevent a Systematic Exclusion of Blacks from Criminal Trial Juries, 41 Alb.L.Rev. 623 (1977) (advocating use of Sixth Amendment analysis to require government either to show that peremptory was not exercised because of defendant's race or to articulate a nonracial reason for exercise of peremptory challenge of black venirepersons).

The Supreme Court rendered its decision in Batson on April 20, 1986, approximately two months after the district court denied Jones' petition for habeas corpus relief and a little more than a year after the expiration of the time for filing a petition for a writ of certiorari to the United States Supreme Court.[4] On appeal, Jones seeks a retroactive application of Batson. This remedy, however, is clearly barred by the Supreme Court's subsequent opinion in Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). In Allen, the Court held that Batson is not to be applied retroactively on collateral review of convictions which have become "final" prior

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[4] The Alabama Supreme Court denied Jones' petition for a writ of certiorari on October 19, 1984. Jones then had ninety days to file for certiorari with the Supreme Court. U.S. S.Ct. Rule 10, 28 U.S.C.

to the announcement of the Batson decision. The Court defined "final" as meaning "'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in' Batson." Allen, 478 U.S. at ___ n. 1, 106 S.Ct. at 2880, n. 1. Clearly, Jones' conviction became final prior to the court's announcement of Batson. Any reliance on Batson is, therefore, without merit. Instead, Jones' claim must be reviewed under the standard articulated in Swain.[5]

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[5] In Lindsey v. Smith, 820 F.2d 1137 (11th Cir. 1987), this court held that a defendant cannot escape the preclusive effect of Allen v. Hardy, supra, merely by substituting a Sixth Amendment label on the claim. Lindsey precludes any application in this case of a Sixth Amendment analysis freed from the restraints of Swain. But see Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), vacated, __ U.S. __, 106 S.Ct. 3289, 92 L.Ed.2d 705 reinstated (cont. on next page)

Swain established that the "presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court." 380 U.S. at 222, 85 S.Ct. at 837. This presumption cannot be rebutted by the allegation that in the particular case at hand the prosecutor struck all the blacks on the venire or even that he struck all the blacks on a venire because they were black. Rather, the presumption in favor of the prosecutor may be rebutted, according to Swain, by showing a systematic striking of blacks from the jury venire in "case after case, whatever the circumstances,

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[5](cont. from previous page) on remand, 801 F.2d 871 (6th Cir. 1986), cert. denied, __ U.S. __, 107 S.Ct. 910, 93 L.Ed.2d 860 (1987); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated, __ U.S. __, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986); United States v. Hardiman, 656 F.Supp. 1006 (N.D.Ill. 1987).

whatever the crime and whoever the defendant or the victim may be." 380 U.S. at 223, 85 S.Ct. at 837. Such a showing, the Swain Court reasoned, could be sufficient to establish a "prima facie case" that the prosecutor was using the peremptory system "to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population," id at 224, 85 S.Ct. at 838, in violation of the Fourteenth Amendment.

In Willis v. Zant, 720 F.2d 1212, 1220 (11th Cir. 1983), we set forth the method by which a petitioner may make out a prima facie case under the Swain standard and thus overcome the presumption that the prosecutor acted within the confines of the Fourteenth Amendment equal protection clause.

> At his evidentiary hearing, petitioner must prove on specific

facts [18] that [the prosecutor] had a systematic and intentional practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated in petitioner's trial. The exclusion must have occurred 'in case after case, whatever the circumstances, whatever the crime and whoever the defendant may be.' Swain, 380 U.S. at 223 [85 S.Ct. at 837]. Petitioner is not required to show that the prosecutor always struck every black venireman offered to him, [United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971)], but the facts must manifestly show an intent on the part of the prosecutor to disenfranchise blacks from traverse juries in criminal trials in his circuit, "to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." Swain, 380 U.S. at 224 [85 S.Ct. at 838]. The prosecutor's use of peremptory challenges in only a few trials is clearly insufficient to state a prima facie case [footnote omitted], as would be a pattern of exclusion which occurred for only a

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[18] This proof could be direct evidence such as testimony, or indirect evidence such as statistical proof. Mere allegations are insufficient. (citations omitted).

> few weeks. In short, petitioner must marshal enough historical proof to overcome the presumption of propriety in which Swain clothes peremptory challenges, and thereby show '[the prosecutor's] intent to discriminate invidiously.

720 F.2d at 1220 (emphasis in original).

We believe that Jones has met this initial burden. At his evidentiary hearing in state court, Jones presented the testimony of six criminal attorneys practicing in Mobile whose experience spanned two and one-half years to fourteen years. All of them testified to having observed a pattern and practice on the part of the district attorney's office to use their peremptory challenges systematically to strike blacks from the jury venire. In support of their observations of the practice or pattern, almost all of them testified about specific cases in which they had observed the prosecutor systematically using his peremptory

challenges to eliminate black venirepersons, often even before the prosecutor had questioned them. Each of the attorneys testified that the behavior by the prosecutor had been so obvious to them that they had all made their objections a part of the record in some of the cases they had tried.

Robert Clark, who had practiced law in Mobile for fourteen years, recalled many specific examples of the prosecutor striking black jurors, some of which had prompted him to object. Clark also testified to having noticed a pervasive pattern of exclusion of blacks by the prosecutor's office:

> Defense Attorney: [W]hat pattern have you noticed?
>
> Clark: A systematic exclusion of blacks not only in where black males are defendants but a systematic exclusion of blacks from jury service. They use their peremptory challenges for the systematic exclusion of blacks.

Defense Attorney: Just from any criminal trial?

Clark: Yes, sir.

Clark testified that his observations were confirmed by a consensus of the members of the Mobile criminal defense bar. Clark recalled the names of five specific cases in which he had raised objections to the fact that peremptory challenges were used by the prosecutor "to exclude blacks totally from at least five venires." In addition, Clark recalled a sixth case he had tried against McGregor, the same prosecutor as in this case, in which McGregor had used all his peremptories to strike blacks from the venire.

Jeff Deen, an attorney who had practiced in Mobile for six years, and participated in about 150 cases, also testified to observation of this pattern. Deen testified that this observation had

prompted him not only to object, but recently to begin a statistical study of all the cases he tried. He had, at the time he testified, completed statistical studies of two cases and in those cases the prosecutor had used all his peremptories to strike blacks on the venire, some of whom the prosecutor had not even questioned. Perhaps even more significantly, Deen had worked as an attorney in the district attorney's office and he testified that in the course of his employment there one of the lawyers in the office told him, "You're a fool to leave a young black male on a jury."

Lee Stamp had practiced in Mobile for two and one-half years and stated he had been familiar with about twenty-four cases in that period. He testified to having observed a pattern, whereby this prosecutor's office would first strike all blacks and then any Asian or Hispanic

person. He could testify with full recall about three specific cases in which the prosecutor used his peremptories to strike all blacks from the venire. Stamp testified that he had objected to this practice several times.

Roosevelt Simmons, a Mobile attorney of two and one-half years, with knowledge of about twenty-five cases, testified to this pattern, testified to having objected to it at least five or six times, and testified that as a member of the Bay Area Bar Association (an association of black attorneys) he was participating in a project designed "to observe and research the practice of the District Attorney's office in excluding blacks from the jury."

Major Madison, an attorney with over two years experience testified to having observed this pattern, in his own practice (four or five criminal trials in the last two years), and to having discussed it with many other members of the local bar who had

also observed the pattern. Madison mentioned specifically his last trial in which the prosecutor was McGregor. McGregor had used his peremptories to strike all but one black person from the venire.

Steve Orso, also with about two and one-half years experience, testified that he had, in the course of thirty to forty-five trials, noticed a prosecutorial pattern of striking all blacks from the venire, that he began objecting to this practice, and that thereafter he observed that in the last three or four cases he tried the prosecutor struck all but one of the blacks on the venire.

The state adduced no evidence to cast doubt upon the existence of such a pattern.[6] In fact, the prosecutor's

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[6] The district attorney's cross-examination of each witness focused essentially on two points; first, that each witness had only observed a specific number of cases; and, second (cont. on next page)

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[6] (cont. from previous page) that no witness could "state under oath unequivocably that in every case [the witness had] tried or observed the District Attorney's office has used all of its peremptory challenges against blacks." Neither of these two points is sufficient under Willis. "Petitioner is not required to show that the prosecutor always struck every black venireman offered to him.... The prosecutor's use of peremptory challenges in only a few trials is clearly insufficient to state a prima facie case, (footnote omitted) as would be a pattern of exclusion which occurred for only a few weeks." 720 F.2d at 1220. Here, Jones' case suffers from neither of those deficiencies. None of his witnesses had practiced less than two and one-half years and two had practiced much longer. The total number of cases the witnesses had collectively observed was substantial. Each witness stated that all or almost all blacks were struck from the venire panel in every case they recalled.

The state presented no witnesses of its own except for McGregor, the assistant district attorney who had prosecuted Jones and who had been with the district attorney's office only four or five months. McGregor's testimony was a conclusory statement that he was unaware of any policy to systematically strike blacks. In addition, he testified that in ten of the twelve cases he had tried he had "not used my strikes to strike all blacks off the jury." Thus, he conceded that he did strike all blacks off the jury in two of his cases. Moreover, McGregor's testimony as a whole leaves a strong impression that he struck most blacks in the other cases. Other witnesses' testimony indicated that McGregor often struck all the blacks but one.

testimony raised at least an inference that the jurors in this case were struck on the basis of race.[7] Jones' attorney offered twice to present more testimony of the kind described above but the trial judge discouraged him by stating, "[d]on't you think we've had enough," and by suggesting that further evidence would be cumulative.

Although a stronger case could have been established by researching the court

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[7] After listing several reasons why he might typically strike a black juror - e.g., not gainfully employed or not a family man-the prosecutor, McGregor, was asked whether the seven blacks he struck from the just completed Jones trial fit those categories. McGregor acknowledged they may not have, stating that he struck those seven jurors because he did not like their looks. Under these circumstances, McGregor's stated reason for striking the jurors in this case entails a reasonable inference that they were struck on the basis of race. Although McGregor also testified in conclusory fashion that he was unaware of any policy to systematically strike blacks, Willis holds that such conclusory testimony is insufficient.

records to prove statistically the observations of the six witnesses, statistical evidence is not necessary. Willis v. Zant, 720 F.2d at 1220 n. 18. Moreover, the state's evidence virtually made no challenge to the existence of such a pattern. In light of the substantial evidence adduced by Jones at the state evidentiary hearing, in light of the restriction upon his presentation of additional evidence, and in light of the prosecutor's apparent belief that he need not adduce rebuttal evidence, we remand this case to the district court for an evidentiary hearing to be conducted pursuant to the guidelines established in Willis v. Zant, supra.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| REGINALD JONES, | : | |
| Petitioner, | : | |
| vs. | : | CA 85-0838-BH-C |
| J. O. DAVIS, | : | |
| Respondent. | : | |

Reginald Jones, a state prisoner presently in the custody of respondent, is before this Court for the second time, petitioning for federal habeas corpus relief pursuant to 28 U.S.C. §2254. The petition has been referred to the Magistrate for report and recommendation pursuant to 28 U.S.C. § 636(b)(1) (B).

When this case was first before the undersigned, one of the issues raised by petitioner was that an Assistant District Attorney in Mobile County, Alabama, Bob McGregor, used seven of his nine peremptory

challenges to strike all the blacks on the jury venire leaving an all-white petit jury in the trial of Jones' cause.[1] Petitioner claimed then, and does now, that the state's purposeful, deliberate, and systematic use of its peremptory challenges to remove all the blacks from his venire violated his constitutional rights.[2] On January 17, 1986, the undersigned recommended that Jones' petition be denied,

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[1] Jones was convicted of burglary in the third degree and sentenced to life imprisonment under Alabama's felony habitual offender statute. See ALA.CODE § 13A-5-9 (1982).

[2] This case arises solely under the Equal Protection Clause of the Fourteenth Amendment. This Court will not analyze petitioner's claim in terms of a violation of the Sixth Amendment right to a traverse (petit) jury representing a fair cross-section of the community. See Willis v. Zant, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983), cert.denied, 467 U.S. 1256, 104 S.Ct. 3546, 82 L.Ed.2d 849 and cert.denied. 467 U.S. 1256, 104 S.Ct. 3548, 82 L.Ed.2d 851 (1984); see also United States v. Dennis, 804 F.2d 1208, 1209 n.21 (11th Cir. 1986)(cont. on next page)

in significant part finding that petitioner had not shown a systematic use of peremptory challenges to exclude members of the black minority race in jury trials conducted in Mobile County, Alabama sufficient to entitle him to relief under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, reh'g denied, 381 U.S. 921, 85 S.Ct. 1528, 14 L.Ed.2d 442 (1965).[3] This recommendation was adopted

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[2] (cont. from previous page) ("We are constrained by binding Eleventh Circuit authority, however, to reject appellants' invitation to grant the relief they seek on sixth amendment grounds, should equal protection prove unavailing.") , cert.denied, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987).

[3] The Swain standard is clearly applicable rather than the standard enunciated in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See Jones v. Davis, 835 F.2d 835, 837 (11th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 1735, 100 L.Ed.2d 199 (1988).

as the opinion of the District Court on February 13, 1986, Jones thus being denied the relief requested in his petition.

Jones appealed the denial of his petition seeking habeas corpus relief to the Eleventh Circuit Court of Appeals. On January 15, 1988, the appellate court reversed and remanded the case for an evidentiary hearing to be conducted pursuant to the guidelines established in Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983).

In Willis v. Zant, the Eleventh Circuit set forth the method by which a petitioner may prove a prima facie case under Swain, thus overcoming the presumption that the prosecutor[s] acted within the confines of the Equal Protection Clause of the Fourteenth Amendment.

> At his evidentiary hearing, petitioner must prove on specific facts[18] that [the prosecutor(s)] had a systematic and intentional

practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated in petitioner's trial. The exclusion must have occurred "in case after case, whatever the circumstances, whatever the crime and whoever the defendant may be." Swain. 380 U.S. at 223 [85 S.Ct. at 834]. Petitioner is not required to show that the prosecutor always struck every black venireman offered to him, [United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971)], but the facts must manifestly show an intent on the part of the prosecutor[s] to disenfranchise blacks from traverse juries in criminal trials in his circuit, "to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." Swain, 380 U.S. at 224 [85 S.Ct. at 838]. The prosecutor's use of peremptory challenges in only a few trials is clearly insufficient to state a prima facie case [footnote omitted], as would be a pattern of exclusion which occurred for only a few weeks. In short, petitioner must marshal enough historical proof to overcome the

> presumption of propriety in which Swain clothes peremptory challenges and thereby show [the prosecutor's] intent to discriminate invidiously.
>
> [18]This proof could be direct evidence such as testimony, or indirect evidence such as statistical proof. Mere allegations are insufficient. (citations omitted).

720 F.2d at 1220 (emphasis in original). If the petitioner is able to establish a prima facie case the presumption of propriety in which Swain clothes the prosecutor's (or District Attorney's Office) use of peremptory challenges will have been overcome. The burden of proof would then shift to the prosecutor or District Attorney's office to rebut petitioner's prima facie case by showing either (1) "that racially neutral selection procedures have produced the historical and systematic disparity[,]" id. at 1220

(citations omitted), or (2) that there were "neutral reasons for the striking of all blacks in petitioner's trial itself." Id. at 1221.[4]

The undersigned conducted a Willis v. Zant evidentiary hearing March 13-15, 1989. Prior to that hearing, petitioner's counsel argued that the Eleventh Circuit in its opinion determined that petitioner made out a prima facie case under Swain at the state court evidentiary hearing and that this Court, accordingly, need only determine whether respondents could rebut the prima facie case. This Court disagrees with petitioner's reading of the Jones v. Davis opinion, as had the appellate court found that petitioner established a prima

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[4] In the instant case, were this Court to determine that petitioner proved a prima facie case under Swain, habeas relief would be in order as respondents have produced no rebuttal evidence.

facie case under Swain, it would not have remanded the case for a full evidentiary hearing under the guidelines established in Willis v. Zant; rather, it would simply have remanded the case for a hearing to determine whether the respondent could rebut petitioner's prima facie case. Having failed to do the latter, the Magistrate understands the appellate court as remaining unconvinced that petitioner proved a prima facie case under Swian.

FACTS

At the evidentiary hearing conducted by the undersigned March 13-15, 1989, numerous witnesses testified, including the Mobile County District Attorney, present and former assistant district attorneys, defense attorneys, and two experts. The manner in which the Eleventh Circuit wrote the Jones opinion and the manner in which

the evidentiary hearing was conducted necessitates that the undersigned separate the facts and discussion into two sections each to determine whether, on the one hand, petitioner is able to prove on specific facts that Bob McGregor had a systematic and intentional practice of excluding blacks from petit juries in criminal trials through the exercise of peremptory challenges and that this practice continued through the date of petitioner's trial and whether, on the other hand, the Mobile County District Attorney's Office was guilty of the same practice.

A. Bob McGregor. Reginald Jones' case was tried to a jury on January 23, 1984. Prior to that time, Bob McGregor had prosecuted six other cases spanning the time period from October 26, 1983 through January 11, 1984. The defendants in these seven cases were all black males, excepting Frances Stork, a white female.

McGregor testified that during his tenure with the district attorney's office, he received no instructions from supervisory personnel regarding the striking of jurors nor did the office have a policy with regard to jury selection; rather, it was left to the individual assistant district attorney to determine how to employ his peremptory challenges in striking jurors.[5] In striking individual jurors, McGregor considered various demographic characteristics, if known (e.g., age, race, gender, employment, education, marital status, area of town in which juror resides, etc.), along with the demeanor of the juror, how the juror answered voir dire questions, and whether the juror had ever been a crime victim, was

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[5] Based on his experience, McGregor testified that the district attorney's office did not have a pattern or practice of striking all or substantially all blacks from jury venires in criminal trials solely on the basis of race.

related to a law enforcement official, had problems with the law enforcement officials in the past, or had knowledge of the crime. He testified that race was a factor in his use of peremptory challenges in each of the seven cases he tried on or before January 23, 1984, being most important in the Jones and Wright cases. In fact, McGregor admitted that race was one of the strongest, if not the strongest, factor he relied on in removing blacks from the Jones venire as the victim was an older white male and he felt black jurors on the venire would be more susceptible to accepting what he felt would be the inevitable defense argument, namely, that "this old white man probably thinks all blacks look alike."[6]

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[6] McGregor explained that his comment in the state court evidentiary hearing that he did not like the way the jurors "looked" was not a racist remark; rather, he was not comfortable with the black veniremen and did not feel he had a strong personality which would not fall prey to the anticipated defense argument.

McGregor's understanding of Swain was that the prosecution could strike black veniremen for racial reasons so long as there was no pattern or practice in case after case of using strikes to exclude blacks from petit juries. He maintained throughout the hearing that at no time did he develop such a pattern or practice.

Two experts analyzed the aforementioned seven cases from a statistical point of view using the strike sheets provided to them. The petitioner's statistical expert, Larry Dale Hall, employed three statistical tests or models, i.e., the binomial test, Chi-Square analysis, and percentage analysis, to determine if there existed a statistically significant indication of racial discrimination in McGregor's exercise of

peremptory challenges.[7] With the binomial test and the Chi-Square analysis, the "randomized test" was used to evidence disparity as statistical tests are stated in terms of probability, null hypotheses, and the possibility of a sample differing from the population.[8] The binomial test was used to compare what actually happened to the theoretical percentage of blacks represented in the reduced venire pool[9]

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[7] With these tests, Hall assumed either that the state used all its strikes first or that the defense did, as both experts were in agreement that although alternative striking (which of course actually takes place) would have an impact on the statistical analysis, the impact would not be very significant and to analyze the strikes using the alternative method would be unduly cumbersome.

[8] Hall stated that using these three tests, he focused primarily on the striking practices of McGregor and not the jury composition in each case because he felt that was what was required under Swain.

[9] The ultimate starting point on all tests was the reduced venire pool which represents the pool of jurors from which the defense and state strike after the Court has removed certain veniremen for cause.

with what would happen assuming the strikes were made at random. That is, the exact probability of getting the results obtained if the selection process was random is stated by this test. Establishing a significance level of .05, Hall rejected the null hypothesis that the samples (see, e.g., Tables 1, 3, 5, 7, 9, 11, 13 & 16) were taken at random from the populations specified (proportion of blacks in the reduced venire pool) in five of the seven trials (i.e., Peterson, Napier, Brooks, Wright and Jones). For example, the probability that seven blacks or more were removed from the Wright reduced venire pool (43% were black) in nine strikes is 4 in 100 and the probability that seven blacks were removed from the Jones reduced venire

pool (23% were black) in nine strikes is 1 in 1000.[10]

The Chi-Square analysis compares a theoretical expectancy to an observed expectancy (i.e., compares a theoretical expectancy to what actually happened). This test reveals, in the case of the striking of veniremen, what proportion of blacks and whites should have been removed given their percentages in the population you start with. Assuming 35% blacks in the population, you would expect random selection to strike 35% of

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[10] Hall noted problems in using the binomial test with the data the experts were called to analyze (i.e., the striking of jurors), as this data does not fit the following two requirements of the model: (1) the model assumes that the proportion of blacks and whites remains the same (i.e., it assumes the same number of blacks are in the population each time a draw is made instead of a reduction occurring) ; and (2) the model assumes replacement occurs. Therefore, while Hall accorded the test some weight in arriving at his conclusion, he did not place much credence in the appropriateness of using this test given this data.

the blacks.[11] Table 17 shows the expected number of state strikes that would have been in proportion to the number of blacks and whites in the reduced venire pool (i.e., expected number of state strikes - 42 white and 16 blacks) and then compares that to the actual number of strikes made by the state (18 white and 40 blacks). Chi-Square is significant at the point of .001, meaning that the chances of something happening randomly would be less than 1 in 1000. The combined data from the seven cases met the significance level.

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[11] Hall admitted that the problem with this test is that he could not individually apply it to each of the seven cases as the seven jury selection procedures had too few drawings by either the state or defense to use the Chi-Square statistics for analysis. Therefore, Hall added the total number of black and white strikes from the seven cases and compared them to the overall percentage of black and white veniremen to determine if the strikes were made by chance.

Finally, Hall relied on a percentages analysis. Table 22 reflects that the total number of blacks represented in the reduced venire pool in the seven cases was 28% and the ultimate jury composition was 18%, representing a 10% reduction.[12]

Hall concluded that the statistical tests showed that the results were not random. Running the alternative hypothesis that racial discrimination did occur, Hall rejected the null that the strikes were random and accepted the alternative hypothesis that racial discrimination occurred in McGregor's striking

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[12] Hall stated that the problem with percentages is determining what the differences mean in terms of the likelihood or probability of the differences occurring.

practices.[13] When asked whether seven cases was enough to establish an historic pattern or practice, Hall responded that seven cases is very limited, the only history being the six cases tried prior to the seventh.

Dr Furman Smith, the respondent's expert, determined that the probability of the striking process occurring in the seven cases as it did at random was 1 in 1000. However, Smith noted that in five of the seven cases, blacks served as jurors and in

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[13] That is, Hall felt black veniremen were systematically removed from the reduced venire pool by McGregor in the seven cases considered. "In every case, the state strikes reduced the percentage of blacks left in the venire pool. In five of the seven cases, the reduction was substantial." Hall admitted, however, that the statistical tests employed did not reveal the reasons why particular jurors were struck. That is, there is no way to conclusively determine whether racial discrimination in fact took place based on the statistics even though it was clear to the expert the selection process was not at random or race neutral.

two of those cases, McGregor could have created all-white juries had he so chosen. Smith testified further that had blacks served in exact proportion to their representation on the venire on the juries, there would have been 3.3 blacks per jury whereas what actually was seen was 2.1 blacks per jury. If McGregor had struck as many blacks as possible, there would have been only .7 blacks per jury. Finally, Smith came up with the same percentages as Hall, noting that blacks represented 28% of the reduced venire pool and 18% of jury composition. On the basis of the tests he ran, Smith concluded that blacks were not systematically excluded from the seven jury venires.

B. Mobile County District Attorney's Office. No statistics were offered with regard to whether the Mobile County District Attorney's office had a systematic and intentional practice of

excluding blacks from petit juries in criminal cases through the exercise of peremptory challenges and that this practice continued unabated through the petitioner's trial; only direct testimony from criminal defense attorneys, the District Attorney of Mobile County, and present and former assistant district attorneys, was elicited in this regard.[14]

To a man, Chris Galanos and the present and former assistant district attorneys who testified (i.e., Lawrence Hallett, Chris Hargett, William Steele, Tom Harrison, and Bob McGregor) testified that

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[14] The questions posited to the various witnesses, at the hearing, were confined to the period of February 26, 1979 (the present District Attorney, Chris Galanos, began serving in that capacity on this day) through January 23, 1984 (the date of petitioner's trial). However, for those defense attorneys deposed in August, 1988, the questions were generally confined to the period of August, 1982 through January 23, 1984.

there was never an office-wide policy in the Mobile County District Attorney's Office with regard to striking juries or guidelines published in this regard and that assistants were never given formal instructions on how to strike juries; rather, the selection of jurors was left entirely to the individual prosecuting the case. These men also testified that during the relevant time period, there never existed a policy of striking blacks from jury venires solely because of their race.

Lawrence Hallett, Chief Assistant District Attorney from February, 1979 to May, 1979 testified that since leaving that office, more than half of his practice has been in the criminal defense area but that he has observed nothing occurring within the district attorney's office causing him to look closely at the state's removal of blacks from jury venires. Although less than half his clients have been black, he

has never had occasion to make a Swain objection to the state's use of its peremptory challenges.

Chris Hargett, assistant district attorney from December, 1981 to June, 1984, stated that there was never a policy designed to keep blacks off petit juries and that the district attorney's office in fact desires black representation on certain petit juries. Specifically, Hargett testified that of the murder cases he prosecuted, six had black victims and he desired the presence of blacks on those juries. Furthermore, he estimated that most of the juries in the 74 to 100 cases he prosecuted were comprised partly of black veniremen.[15]

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[15] Although limited voir dire was available during this period, Hargett looked to see if anyone knew the defendant, was from his (her) neighborhood, was familiar with the facts of the case, had an arrest record or past problems with the police, or had any other characteristics which might cause the juror to identify with the defendant.

William Steele, assistant district attorney from 1981 through 1985 and chief assistant 1985 through 1987, testified that of the forty to fifty cases he prosecuted, the majority had one or more blacks represented on the jury. He denied that race was a major factor in the striking of jurors in the district attorney's office, but admitted it was a factor considered by him. Although voir dire was limited, the material he considered in striking jurors was the information contained on the strike sheet, prior service of the juror, physical appearance (including demeanor, race, gender, age) and how the jurors answered those questions posited during voir dire. Steele testified that he did not know that other assistants were not motivated by racial animus or racial reasons in the striking of jurors but stated that he was

not aware of anyone who struck on that basis and testified further that no one told him to strike on that basis.

Tom Harrison, assistant district attorney from December, 1980 through January 11, 1986 (chief assistant from January 1, 1982 to 1985) and from December, 1988 to the present, testified that he was not aware of any assistant who used race as the sole and primary factor in striking veniremen. He stated that the only instructions given new assistants with regard to striking was informing the assistants of the actual physical mechanics of striking (e.g., that the state strikes first) if they were not cognizant of same.

Jim Byrd, a criminal defense attorney, testified that during the period from October, 1979, when he was admitted to the practice of law, to January, 1984, he tried approximately 30 to 50 criminal jury trials. Byrd's observation during this

time was that the assistant district attorneys, as a whole, struck a disproportionate number of blacks from jury venires and that if the assistants had enough strikes to remove all blacks from the various venires, they would.[16] Byrd testified, moreover, that in late May or June of 1984, assistant district attorney Richard Shields told him that assistant district attorney Lloyd Copeland told the assistants to strike blacks from juries.[17] Byrd admitted, however, that

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[16] His perception was that the prosecution was trying to keep blacks off petit juries because blacks generally have a more open attitude toward the defense. Byrd admitted that this attitude might well prevail in the district attorney's office not because the particular juror was black, but because the perception is that the majority of blacks are defense prone.

[17] Jeff Deen testified in his August, 1988 deposition that in the fall or summer of 1981, Lloyd Copeland told him that he was a fool not to strike blacks from the jury venire, especially young black males.

during this period of time, he observed blacks serving on petit juries.

Claude Boone, a criminal defense attorney since January 24, 1974, estimated that from 1979 to January 23, 1984, he tried approximately 50 criminal trials. It was his experience during this time that depending on the race of the defendant, assistant district attorneys would in fact strike a disproportionate number of blacks from the venire in an effort to remove blacks from serving on certain petit juries. He stated the assistants routinely and systematically struck blacks when the defendant was black although he could not cite a specific case in which this happened; however, he was never so concerned with the removal of black veniremen that he filed a Swain challenge. Boone stated that voir dire was so limited that the attorneys had to travel on their instincts and that it was his impression

that the state played one race against another in order to obtain a conviction. Boone testified, however, that he was not to be understood as stating that in case after case, no matter the race of the defendant or victim or other circumstances, that black veniremen were always struck because he saw blacks on juries where the defendant was black or white (i.e., where there was not the slightest racial overtone to the case, blacks were just as likely to serve on petit jruies as whites); rather, only on those cases tinged with racial overtones did he observe what he felt was a systematic attempt by the district attorney's office to strike a disproportionate number of blacks from jury venires.

Al Pennington, a one-time chief assistant district attorney (April 31, 1981

- November 31, 1981),[18] stated that during the period from December, 1981 through January of 1984, he tried twenty to twenty-five cases. It was his experience that when he represented a black defendant and the victim was white, a larger number (i.e., more than half) of the state's strikes were expended on black veniremen if there were that many blacks on the jury venire. It was not his observation that

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[18] Pennington testified that when he was with the district attorney's office, there was no office-wide policy with regard to striking practices. It was his personal striking practice, however, to consider race as a more important factor when the defendant was black and the victim white such that if the defendant was a young black male, the first jurors he would consider striking were young black males. Of the twelve cases he prosecuted, he struck jurors solely on the basis of race on two occasions; in the other cases he did not strike solely on the basis, although race was a major factor in his consideration. Pennington testified that during this time, he would most definitely have kept a good guilt-prone black venireman on the jury.

in case after case, regardless of the race of the defendant or victim or other circumstances, that the state struck blacks to the extent that no blacks served on petit juries in Mobile County, as blacks served on petit juries throughout this time period; rather, the pattern of exclusion occurred primarily when he represented a black defendant.

Donald Briskman, a practicing criminal defense attorney since September 22, 1967, estimated that from 1979 to January 1984, he tried thirty cases. During this time period, it was his observation that when there was a racial overtone or facet to a case (e.g., a black defendant and a white victim) the district attorney's office engaged in an historic pattern of exclusion of blacks from jury venires. However, where no racial overtone existed or the offense was one universally distasteful to all citizens (e.g., a black

or white defendant selling crack cocaine on an inner city schoolyard) the state did not want to remove blacks from the various jury venires, such that blacks actively served on petit juries.

Barry Hess, a criminal defense attorney since May, 1962, estimated that between 1979 and January 23, 1984, he tried fifteen cases. It was his perception that regardless of the race of the defendant or victim, the state would first strike those people who responded on voir dire in a manner assistants felt was unsatisfactory, regardless of race, and then invariably strike blacks.[19] However, he saw blacks on juries during this time, observed cases in which the prosecutor could have removed all blacks but did not, and even observed

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[19] It was his experience that prosecutors viewed blacks as defense oriented.

prosecutors engage in striking practice to ensure the service of blacks on juries.

Paul Brown, petitioner's trial attorney, testified that he was admitted to the bar in September, 1981 and from that time through January 24, 1984, he tried twenty-five to fifty criminal cases. During this period, he observed a pattern of the district attorney's office to use peremptory challenges to remove all or substantially all blacks from jury venires.[20] Brown stated that the striking of black veniremen was especially prevalent when the defendant was a young black male.[21]

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[20] Brown stated that he observed this pattern in case after case no matter the race of the defendant or victim or other circumstances, although he admitted that in the majority of those cases, he was appointed to represent young black males.

[21] It was Brown's opinion during this time that the burden under Swain was so severe that no one could satisfy it short of conducting a statistical overview of the striking practices of the Mobile County District Attorney's office.

Brown admitted, however, that he observed blacks serving on petit juries and further stated that in all cases there was not an arbitrary use by prosecutors to use all the state's peremptory challenges to strike all black veniremen.[22]

James D. Wilson, III, estimated that during the period from 1979 to January 23, 1984, he tried fifteen to twenty criminal cases. He testified that virtually all of his clients were black defendants and that in all these cases, the prosecutors first removed blacks from the jury venire. Wilson admitted that during this time period, he did observe blacks serving on juries although the number of black jurors was not very large.

Robert Clark testified at an August, 1988 deposition, as he did at the state evidentiary hearing, that between August,

[22] Brown testified, however, that there was such an arbitrary use of strikes in Jones.

1982 and January 1, 1984, he tried approximately thirty-five to fifty criminal cases in the Mobile County Circuit Court. He represented primarily black defendants during this period and it was his observation that if his client was black, the state would invariably use all of its peremptory challenges to exclude blacks from the jury venire. However, he stated that he was not to be construed as implying that in case after case the district attorney's office used all of its peremptory challenges to remove black veniremen, with the result that blacks were never allowed to serve on petit juries, as blacks did in fact serve on petit juries during this time period. In fact, it was Clark's testimony that where the defendant was white and the victim black, blacks would invariably serve on petit juries.

Jeff Deen, a former assistant district attorney (July, 1979 - December, 1981)[23] testified that from January, 1982 to January 23, 1984, he tried approximately fifty cases. Deen stated that it was his observation that the district attorney's office had a policy of excluding blacks from petit juries in case after case regardless of whether the defendant was black or white. He estimated that 80% of the state's strikes would be used against blacks even if the defendant was white while more than 80% would be employed against blacks if the defendant was black. Deen admitted, however, that blacks did serve on petit juries.

Major Madison testified that he tried at least four to five trials in the period from 1982 through January, 1984.

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[23] Deen stated that as a prosecutor, he never engaged in a pattern or practice of excluding blacks from petit juries.

During this time period, all the defendants he represented were black. It was his observation that in these cases, black veniremen were struck first by the prosecutors such that if a particular prosecutor had enough challenges to remove all blacks from the venire, a black juror would seldom serve on petit juries.[24] Madison stated that it was the general tone of conversation he had with other defense attorneys that when a black defendant was being prosecuted in Mobile County, it was extremely tough, if not impossible, to get blacks on the jury. Madison, like all other defense attorneys, conceded that blacks did serve on petit juries but stated that it was unusual for there to be more than one or two blacks on a jury.

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[24] Madison estimated that the state used 80-90% of its strikes against blacks first.

Roosevelt Simmons testified that during this time period, it was not his observation that the district attorney's office in case after case used its peremptory challenges to remove black veniremen with the result that no black ever served on a petit jury; rather, it was his perception that in those cases involving black defendants, the state commonly used all its strikes to remove blacks from the jury venire. He stated that in very few of his cases up to January, 1984, did he have a black juror although he stated that he has represented a black defendant and had black jurors and indicated that when he got an acquittal, he usually had at least two or three blacks on the jury.

Steve Orso testified that during the relevant time period, he tried approximately thirty criminal cases; a majority of the defendants in these cases

were black. It was his impression that if the prosecutors had enough strikes to remove all the black veniremen, no blacks would serve on the petit jury.

Finally, Lee F. Stamp, Jr., testified that from the time he was admitted to practice law (December, 1981) through January, 1984, he tried approximately seven to nine cases. All of his clients during this period were young black males, aged 18 to 24, save one white defendant, William LaDue. It was his observation that the district attorney's office, as a practice, struck all blacks from jury venires in case after case regardless of the race of the defendant (e.g., the prosecutor struck all blacks in the LaDue case). Stamp conceded that of the cases he tried, one jury was 50% black

and another jury was comprised of three or four blacks.[25]

DISCUSSION

As was indicated above, a petitioner can establish a prima facie equal protection violation under Swain v. Alabama. 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), if he proves that

> the prosecutor . . ., in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of [blacks] who have been selected as qualified jurors by the jury commissioners and who

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[25] This Court notes that to a man, the defense attorneys acknowledged that their testimony was based solely on their observations, none having knowledge of a written or admitted policy or practice of the district attorney's office to remove blacks from jury venires solely on the basis of race.

> have survived challenges for cause, with the result that no [blacks] ever serve on petit juries.

Id. at 223, 85 S.Ct. at 837.[26] The Eleventh Circuit has read this standard broadly, holding that the petitioner is not required to prove that a particular prosecutor or the district attorney's office used the peremptory challenge to exclude every black venireman offered. Willis v. Zant, supra. 720 F.2d at 1220 (citing United States v. Pearson, 448 F.2d1207, 1217 (5th Cir. 1971)). Nevertheless, the appellate court has also recognized that a petitioner raising a

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[26] In Swain, the record revealed that no black had served on a petit jury in Talledega County, Alabama since 1950. The record, however, did not reveal the extent to which the absence of blacks on juries was the state's responsibility. 380 U.S. at 226, 85 S.Ct. at 839. Therefore, the Court concluded that the petitioner failed to lay the proper predicate for proof of systematic exclusion of blacks from jury service. Id.

Swain claim "'bears a heavy burden when he seeks to show systematic discrimination of constitutionally significant proportions.'" Willis v. Kemp, 838 F.2d 1510, 1518 (11th Cir.)(quoting United States v. Brooks, 670 F.2d 148, 151 (11th Cir. 1982), in turn quoting Easter v. Gamble, 609 F.2d 756, 759 (5th Cir. 1980)), reh'g denied, 845 F.2d 1032 (1988) (en banc), cert. denied , ___ U.S. ___, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989). This Court is convinced that Jones' proof, does not make out a prima facie case of systematic exclusion of black jurors under Swain.

A. Bob McGregor. At the trial of Reginald Jones, the district attorney, Bob McGregor, used seven of his nine allotted peremptory challenges to remove all the blacks from the jury venire, leaving an all-white jury to sit in

petitioner's case. McGregor's testimony at the evidentiary hearing indicates that the prosecutor struck blacks from the Jones venire primarily on the basis of race as McGregor felt blacks would be susceptible to what he felt would be the inevitable defense argument that "the old white victim probably thinks all blacks look alike."

"The prosecutor's striking of all black jurors . . . in petitioner's trial, creating an all-white petit jury, does not, by itself, establish a Swain violation." Willis v. Kemp, supra, 838 F.2d at 1518 (citations omitted). In Swain v. Alabama, the Court held that the presumption in any particular case that the prosecution is using the state's peremptory challenges to obtain a fair and impartial jury to try the case before the court is not overcome by allegations that in the case at hand all blacks were removed from the jury or that they were removed because

they were black. That is, the prosecutor's challenges would not violate the defendant's constitutional rights even if the challenges were racially motivated.

> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. ... While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. ... It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," ... upon a juror's "habits and associations," ... or upon the feeling that "the bare questioning [a juror's] indifference may sometimes provoke a resentment,". ... It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide

> is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is likely to be.
>
> ...
>
> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and White, Protestant and Catholic, are alike subject to being challenged without cause.

Swain, 380 U.S. at 220-21, 85 S.Ct. at 835-36 (footnotes and citations omitted). Thus, McGregor's striking of all the black veniremen from petitioner's venire does not, of itself, establish a Swain violation. Accordingly, this Court turns to the question of whether the statistical evidence relating to McGregor's seven trials establishes a systematic and historical use of the peremptory challenge to exclude blacks from petit juries.

To this end, the Willis v. Zant opinion recognizes that "[t]he prosecutor's use of peremptory challenges in only a few trials is clearly insufficient to state a prima facie case, as would be a pattern of exclusion which occurred for only a few weeks. In short, petitioner must marshal enough historical proof to overcome the presumption of propriety in which Swain clothes peremptory challenges, and thereby show [the prosecutor's] intent to discriminate invidiously." 720 F.2d at 1220. The undersigned is of the opinion that the statistics from the Jones trial and those from the six cases McGregor prosecuted prior to Jones provide an insufficient basis for stating a prima facie Swain violation. Nevertheless, a review of the statistics fails to establish that McGregor systematically excluded blacks from petit juries (including petitioner's) in violation of Swain even

though the statistics do bear out that McGregor struck a higher proportion of black jurors than white jurors. The statistics indicate that blacks served on five out of the seven juries even though McGregor could have entirely eliminated blacks from two of those juries through the use of peremptory challenges. While McGregor did strike some forty blacks from the reduced venire pool, he allowed sixteen blacks to sit as jurors, even though nine of the sixteen could have been stricken had he so chosen. Moreover, as noted by Dr. Fulman Smith, if blacks served on the juries in exact proportion to their representation in the various venires, there would have been 3.3 blacks per jury whereas what was actually seen was 2.1 blacks per jury; if McGregor had struck as many blacks as possible, there would have

been only .7 blacks per jury.[27] Finally, blacks represented 28% of the reduced venire pool and 18% of the jury composition. On the basis of the foregoing evidence, the undersigned cannot find that McGregor intentionally used his peremptory challenges to disenfranchise blacks. See Edwards v. Scroggy, 849 F.2d 204, 205 (5th Cir.)(no prima facie case established where juries in the First Judicial District of the Seventh Circuit Court District of Mississippi during the period in question were 28.6% black, falling only 9% short of the percentage of jurors in the pre-peremptory strike pool and slightly over 5% short of the number of blacks registered to vote in the district), reh'g

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[27] This Court's calculation of the numbers differs from that of Dr. Smith in that the number of black jurors seen on the seven cases was 2.2 and if McGregor had struck as many blacks as possible, there would have been only one (1) black per jury.

denied, 1988 U.S. App. LEXIS 12296, stay granted, ___ U.S. ___, 109 S.Ct. 297, 102 L.Ed.2d 317 (1988), cert. denied, ___ U.S. __, 109 S.Ct. 1328, 103 L.Ed.2d 597, reh'g denied sub nom. Edwards v. Black, ___ U.S. ___, 109 S.Ct. 1772, 104 L.Ed.2d 207 (1989); Willis v. Kemp, supra, 835 F.2d at 1519 (prima facie case not established where prosecutor struck 70 black jurors but allowed 72 blacks to sit as jurors even though 65 could have been excluded through his use of peremptory challenges).

B. Mobile County District Attorney's Office. This Court turns next to the question of whether Jones has proven that the Mobile County District Attorney's Office engaged in a systematic and intentional practice of excluding blacks from petit juries in the exercise of peremptory challenges and that this

practice continued unabated in petitioner's trial.

As was recognized by the Eleventh Circuit in Willis v. Zant, petitioner can establish a Swain violation by way of direct evidence such as testimony, or indirect evidence such as statistical proof. 720 F.2d at 1220 n.18. Accordingly, at the evidentiary hearing, the Court heard testimony from various defense attorneys, present and former assistant district attorneys, and District Attorney Chris Galanos, rather than compiling statistics from all the criminal trials conducted during the relevant time period. Rather than rehashing in toto the testimony of these attorneys, the Court will focus on the salient features of the testimony.

All of the defense attorneys testifying at the evidentiary hearing or the August, 1988 depositions were of the

opinion that at least in some, if not all of the cases they tried, the various prosecutors used their peremptory challenges disproportionately against blacks on the jury venires. A number of attorneys testified that this practice occurred only in those cases where the defendant was black or where the case had some sort of racial overtone (i.e., the defendant was black and the victim white). While numerous other defense attorneys testified that the race of the defendants did not affect the state's use of peremptory challenges, most of these same attorneys noted that the majority, if not all, of their clients during the relevant time period were black. Furthermore, a number of attorneys, most notably, Claude Boone, Robert Clark, and Roosevelt Simmons stated that it was not their testimony that "in case after case, whatever the circumstances, whatever the crime and

whoever the defendant or the victim may be" Swain, supra, 380 U.S. at 223, 85 S.Ct. at 837, the Mobile County District Attorney's Office was responsible for the removal of blacks from the "reduced venire pool" with the result that no blacks served on petit juries. In fact, all of the defense attorneys who testified did not dispute the fact that blacks served on petit juries in the trial of criminal cases in Mobile County.

As this Court has heretofore indicated, District Attorney Chris Galanos and the present and former assistants district attorney who testified at the evidentiary hearing stated unequivocally that there existed no office-wide policy in the district attorney's office with regard to the striking of jurors, no guidelines were ever published in this regard, and assistants were never given formal instructions on how to strike juries;

rather, jury selection was left entirely to the discretion of the district attorney prosecuting the case. Furthermore, these men testified that during the relevant time period, the district attorney's office never had a policy of striking blacks from jury venires solely on the basis of race. In fact, one former assistant, Chris Hargett, testified that there were many cases he tried where he expressly desired the presence of blacks on the jury and stated further that blacks were represented on the juries in the majority of the 74 to 100 cases he prosecuted from 1981 to 1984.

While this Court is cognizant of the Eleventh Circuit's stance that the petitioner need not show that the state "always struck every black venireman offered to him," Willis v. Zant, supra, 720 F.2d at 1220 (citing United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971)) (emphasis in original), it would be

a misreading of Swain to find on the basis of the evidence presented to the undersigned that the Mobile County District Attorney's Office, through the date of petitioner's trial, "had a systematic and intentional practice of excluding blacks from petit juries in criminal trials through the use of peremptory challenges" and that this exclusion occurred "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be. . . ." Swain, supra, 380 U.S. at 223, 85 S.Ct. at 837). At most, the evidence establishes a policy on the part of the Mobile County District Attorney's Office to challenge a disproportionate number of blacks in those cases in which the defendant was black.[28]

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[28] Again, this Court notes that a number of the defense attorneys testified that this was the practice regardless of the race of the defendant; however, the observation of these attorneys is skewed by the fact that the vast majority of their clients during this period were black.

However, this does not satisfy the requirement of Swain that the exclusion occur "in case after case, whatever the circumstance, whatever the crime and whoever the defendant or the victim may be. . . ." 380 U.S. at 223, 85 S.Ct. at 837; see Ridley v. State, 475 S.W.2d 769 (Tex.Crim.App. 1972) (the evidence, including the testimony of several practicing criminal defense attorneys, concerning the state's use of the peremptory challenge against blacks in cases involving black defendants and white victims, did not establish a systematic exclusion of blacks from petit juries); Hardin v. State, 475 S.W.2d 254 (Tex.Crim.App. 1971) (defendant failed to show a systematic exclusion of blacks from petit juries by the state's use of peremptory challenges where his evidence, including the testimony of three practicing attorneys dealt only with cases involving

black defendants), cert. denied, 408 U.S. 927, 92 S.Ct. 2511, 33 L.Ed.2d 339 (1972);[29] see also Jason v. State, 589 S.W.2d 447 (Tex.Crim.App. 1979) (holding no systematic exclusion where evidence at hearing on motion for new trial included the testimony of several witnesses that prosecutors in Harris County exercised peremptory challenges to strike blacks from jury panels and testimony from the State that there was no office policy or established practice for prosecutors to strike black persons from jury panels solely because of their race; there was also testimony that blacks did and had served on panels in the past). Having failed to satisfy a crucial requirement of

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[29] In fact, even in those cases in which the defendant was black, it was not proven that the district attorney's office always struck every black venireman offered to it.

Swain, this Court finds tnat petitioner is due to be denied habeas relief. The Court further finds that given the State's evidence that there was no office policy for prosecutors to strike blacks from jury venires solely because of their race and the overwhelming testimony that during the relevant time period blacks did serve on jury panels, a Swain violation cannot be found.

## CONCLUSION

It is the opinion of the Magistrate that petitioner's Fourteenth Amendment right to equal protection of the laws was not violated in this cause and that his petition for habeas corpus relief should be denied.

The attached sheet contains important information regarding objections to this recommendation.

DONE this 27th day of July, 1989.

/s/ William E. Cassady
WILLIAM E. CASSADY
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| REGINALD JONES, | : | |
| Petitioner,. | : | |
| vs. | : | CA 85-0838-BH-C |
| J. O. DAVIS, | : | |
| Respondent. | : | |

ORDER

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a de novo determination of those portions of the recommendation to which objection is made, the recommendation of the Magistrate made under 28 U.S.C. § 636(b)(1) (B) is ADOPTED as the opinion of this Court.

DONE this 5th day of September, 1989.

/s/ W. R. HAND

UNITED STATES DISTRICT JUDGE

Reginald JONES, Petitioner-Appellant,

v.

J.O. DAVIS, Warden,
Respondent-Appellee.

No. 89-7745.

United States Court of Appeals,
Eleventh Circuit.

July 19, 1990.

PER CURIAM:

Reginald Jones appeals the second denial, after remand for an evidentiary hearing, of his petition for a writ of habeas corpus. Because the magistrate, whose recommendation the district court adopted, misinterpreted this court's prior opinion, we REVERSE and REMAND for a grant of the writ.

An all-white jury convicted Jones, a black man, of burglary in the third degree. The assistant district attorney of Mobile County, Alabama, created this monochromatic jury by using seven of his

nine peremptory strikes to dismiss all blacks from the jury venire. At the time of jury selection, Jones objected to the assistant district attorney's tactic and moved for a mistrial. The trial court denied the motion but granted Jones the opportunity to address the jury selection issue in a later evidentiary hearing.

Upon being convicted and sentenced, Jones moved the trial court for a new trial based in part on his allegation that the state's purposeful, deliberate and systematic use of its peremptory challenges to strike all black persons from his venire violated his constitutional right to trial by a fair and impartial jury. At the evidentiary hearing that followed, several local criminal defense attorneys supported Jones' motion, testifying that the Mobile County district attorney's office had a pattern and practice of excluding blacks

from jury service, particularly when the defendant in the case was black. The assistant district attorney who prosecuted Jones also testified; he denied the existence of any policy of racial exclusion and explained his use of peremptory strikes thusly: "I didn't like the looks of those seven people and that's why I struck them." The trial court denied the motion for a new trial.

Jones appealed the state's use of peremptory challenges and the trial court's denial of a new trial to the Alabama Court of Criminal Appeals. That court affirmed his conviction without opinion and denied rehearing. Subsequently, the Supreme Court of Alabama, denied Jones' petition for a writ of certiorari. Jones then filed a petition for habeas corpus in the United States District Court for the Southern District of Alabama, alleging that his conviction violates the Constitution or

laws of the United States as a result of the assistant district attorney's racially exclusionary use of peremptory strikes. On the recommendation of the magistrate, the district court denied Jones' habeas petition, and Jones appealed to this court.

In Jones v. Davis, 835 F.2d 835 (11th Cir.) (per curiam), cert. denied, 486 U.S. 1008, 108 S.Ct. 1735, 100 L.Ed.2d 199 (1988), this court reversed the denial of Jones' petition, finding that in the state court evidentiary hearing Jones had met his initial burden of making a prima facie case under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965),[1]

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[1] We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and (cont. on next page)

overruled, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), (Swain still controls cases in which conviction became final before Batson decided), and Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983), cert. denied, 467 U.S. 1256, 104 S.Ct. 3548, 82 L.Ed.2d 851 (1984),[2] of a pattern of systematic

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[1](cont. from previous page) whoever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted....[T]he presumption protecting the prosecution may well be overcome. Such proof might support a reasonable inference ... that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. 380 U.S. at 223-24, 85 S.Ct. at 837-38 (citation omitted).

[2]Willis v. Zant instructs district courts in this circuit on how to handle

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[2](cont. from previous page) evidentiary hearings regarding the Swain issue. First, the petitioner has the occasion to prove on specific facts-that is, direct testimonial or indirect statistical evidence, but never mere allegation-that the prosecutor had a "systematic and intentional practice of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated in petitioner's trial." Id. at 1220 (emphasis in original). While the petitioner need not demonstrate that the prosecutor invariably struck all black venirepersons presented, "the facts must manifestly show an intent on the part of the prosecutor to disenfranchise blacks from traverse juries in criminal trials in his circuit." Id. If the petitioner succeeds in making a prima facie case, the prosecutor can rebut either by showing that "'racially neutral selection procedures have produced the [historical and systematic] disparity,'" id. (quoting United States v. Perez-Hernandez, 672 F.2d 1380, 1387 (11th Cir. 1982) (quoting Alexander v. Louisiana, 405 U.S. 625, 631-32, 92 S.Ct. 1221, 1225-26, 31 L.Ed.2d 536 (1972))), or by showing that "neutral reasons for the striking of all the blacks in petitioner's trial itself" exist. Id. at 1221. In either type of rebuttal, mere assertions of good faith and intentions are insufficient to rebut a prima facie case. "This is not to say that testimony alone is per se insufficient. We believe, however, that if petitioner can show a prima facie case, testimony from the alleged discriminators should be viewed with a great deal of judicial scrutiny.'" Id. (quoting Perez-Hernandez, 672 F.2d at 1387).

exclusion. Because the state court had restricted Jones from presenting additional evidence in support of his allegations and because the assistant district attorney had not availed himself of his right to rebut Jones' evidence, thiscourt remanded the case to the district court "for an evidentiary hearing to be conducted pursuant to the guidelines established in Willis v. Zant." Jones, 835 F.2d at 840 (citation omitted).

The magistrate conducted the Willis v. Zant, evidentiary hearing on March 13-15, 1989. In his Recommendation, the magistrate states:

> Prior to [the] hearing, petitioner's counsel argued that the Eleventh Circuit in its opinion determined that petitioner made out a prima facie case under Swain at the state court evidentiary hearing and that this Court, accordingly, need only determine whether respondents could rebut the prima facie case. This Court disagrees

> with petitioner's reading of the Jones v. Davis opinion, as had the appellate court found that petitioner established a prima facie case under Swain, it would not have remanded the case for a full evidentiary hearing under the guidelines established in Willis v. Zant; rather, it would simply have remanded the case for a hearing to determine whether the respondent could rebut petitioner's prima facie case. Having failed to do the latter, the Magistrate understands the appellate court as remaining unconvinced that petitioner proved a prima facie case under [Swain].

R2-92-6-7. The magistrate concluded that the facts proved by Jones at the hearing did not make out a case under Swain, which recommendation the district court adopted.

We believe that the magistrate misconstrued the prior panel opinion. In Jones v. Davis, this court unequivocally states, "In Willis v. Zant, we set forth the method by which a petitioner may make out a prima facie case under the Swain standard and thus overcome the presumption

that the prosecutor acted within the confines of the Fourteenth Amendment equal protection clause.... We believe that Jones has met this initial burden." 835 F.2d at 838 (citation omitted). The earlier panel did not remand for a full Willis v. Zant hearing because it was unpersuaded that Jones had made his prima facie case; rather, the panel wished to afford Jones the opportunity to present the totality of his evidence without restriction as well as to give the assistant district attorney the chance to rebut Jones' prima facie case.

The magistrate was not free to reexamine this court's conclusion, which constituted the law of the case, that Jones established a prima facie case under Swain. See Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1350 (11th Cir. 1990); Barber v. International Bhd. of Boilermakers, 841 F.2d 1067, 1070-71 (11th Cir. 1988); United States v. Robinson, 690

F.2d 869, 872 (11th Cir. 1982) (both district court and court of appeals bound by factual findings and legal conclusion made by court of appeals in prior appeal of same case). The magistrate, however, did have authority to evaluate the state's rebuttal evidence. This he did in a footnote, stating that "[i]n the instant case, were this Court to determine that petitioner proved a prima facie case under Swain, habeas relief would be in order as respondents have produced no rebuttal evidence." R2-92-6 n.4. We find no error in this conclusion of the magistrate. Thus, since this court previously has found that Jones proved a prima facie case under Swain and since no evidence appears to rebut that prima facie case, we REVERSE the district court's denial of habeas corpus relief and REMAND for the granting of the writ and appropriate relief.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 89-7745

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REGINALD JONES,

Petitioner-Appellant,

versus

J. O. DAVIS, Warden,

Respondent-Appellee.

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On Appeal from the United States District Court for the
Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion July 19, 11th Cir., 1990, __ F.2d __).

Before: FAY and JOHNSON, Circuit Judges, and GIBSON*, Senior Circuit Judge.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
UNITED STATES CIRCUIT JUDGE

*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 89-7745

---

REGINALD JONES,

Petitioner-Appellant,

versus

J. O. DAVIS, Warden,

Defendants-Appellees.

---

On Appeal from the United States District Co
urt for the
Southern District of Alabama

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O R D E R:

( ) The motion of Appellant, for (XX) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

(XX) The motion of Appellant, for (XX) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including November 15, 1990, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the

certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ PETER T. FAY

UNITED STATES CIRCUIT JUDGE

MAGISTRATE'S EXPLANATION OF
PROCEDURAL RIGHTS AND
RESPONSIBILITIES FOLLOWING
RECOMMENDATION, AND FINDINGS
CONCERNING NEED FOR TRANSCRIPT

1. Objection. Any party who objects to this recommendation or anything in it must, within ten days of the date of service of this document, file specific written objections with the Clerk of this court. Failure to do so will bar a de novo determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate. See 28 U.S.C. §636(b)(1)(C); Lewis v. Smith, 855 F.2d 736, 738 (11th Cir. 1988); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. Unit B, 1982) (en banc). The procedure for challenging the findings and recommendations of the Magistrate is set out in more detail in Local Rule 26(4)(b0, which provides that:

> Any party may object to a magistrate's proposed findings, recommendations or report made under 28 U.S.C. §636(b)(1)(B) within ten (10) days after being served with a copy thereof. The appellant shall file with the Clerk, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made and may

accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

A Magistrate's recommendation cannot be appealed to a Court of Appeals; only the District Judge's order or judgment can be appeals.

2. Transcript (applicable Where Proceedings Tape Recorded). Pursuant to 28 U.S.C. §1915 and FED.R.CIV.P. 72(b), the Magistrate finds that the tapes and original records in this case are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

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UNITED STATES MAGISTRATE